UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 38 | Number 2 Article 10

2-1-1960

Criminal Law -- Inciting To Riot

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died before this date?[37] Would there be personal income tax problems raised for the one or two shareholders?[38] In all corporate litigation where the cause of action arose before July 1, 1957, would the one or two stockholders be the real party or parties in interest?[39] Did the corporate status come and go before July 1, 1957, depending on whether at any given time there were at least three shareholders or less than that number?[40] Unfortunately the answers to these and other questions will have to be determined on a case by case basis.

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Criminal Law—Inciting To Riot

In *State v. Cole*[1] the Ku Klux Klan burned two crosses in the county and publicized a meeting to be held later in the week, the purpose of which was to intimidate the Indian population of the county. Before the day of the meeting the sheriff was apprised of tension growing among the Indians of the county. He went to defendant Cole, who claimed to be the Grand Wizard of the Klan, and told him that it would be dangerous to hold the meeting, but the meeting was not cancelled. As members of the Klan began appearing with firearms at the appointed place for the meeting, Indians of the county appeared with firearms and shooting began. Several hundred shots were fired before law enforcement officers could restore order. There was no further attempt to convene the meeting. The defendants Cole and Martin (and others to the State unknown) were indicted for inciting to riot, in that they willfully and unlawfully, while armed with firearms, assembled with the intent to preach racial dissension and coerce and intimidate the populace, and with the common intent to carry out such purpose in a violent manner to the terror of the people and to assist each other against all who should oppose them. The defendants were convicted, and the Supreme Court upheld defendant Cole's conviction of inciting to riot (defendant Martin's conviction was reversed on other grounds). In so doing the court recognized that inciting to riot and riot are separate and distinct offenses and said:

> [I]nciting to riot is a common law offense, the gist of which is its tendency to provoke a breach of the peace, though the parties

[37] This question was raised in Note, 36 N.C.L. REV. 48, 50 (1957).

[38] This question was raised by Latty, *A Conceptualistic Tangle and the One- or Two-Man Corporation*, 34 N.C.L. REV. 471, 479 (1956).

[39] This question was raised by Latty, *A Conceptualistic Tangle and the One- or Two-Man Corporation*, 34 N.C.L. REV. 471, 479 (1956).

[40] This question was raised in 250 N.C. at 570, 109 S.E.2d at 267 (dissent). Judge Bobbitt also dissented in the *Park Terrace* case on its original hearing. If his point of view had been adopted, several problems in North Carolina corporation law might have been avoided.

[1] 249 N.C. 733, 107 S.E.2d 732 (1959).

> first assembled for an innocent purpose. . . . "Inciting to riot . . . means such a course of conduct, by the use of words, signs or language, or any other means by which one can be urged to action, as would naturally lead or urge other men to engage in or enter upon conduct which, if completed, would make a riot."[2]

The court also stated that the defendants could not have been convicted of inciting to riot unless the incitement resulted in a riot.[3]

A survey of the cases pertaining to the crime of inciting to riot, exclusive of the principal case, discloses that there are seemingly only two jurisdictions that have dealt directly with the crime of inciting to riot, Pennsylvania and the District of Columbia. Apparently the earliest case of record in the United States recognizing inciting to riot to be an indictable offense was decided in 1824.[4]

The American cases make it clear that riot and inciting to riot are separate and distinct offenses.[5] In cases where no riot has occurred, but where the defendant's acts or words were such as to imply that they were committed or said with the intent to provoke a riot or with willful disregard of their probable consequences, convictions of inciting to riot have been upheld.[6] In an early case one court, in discussing the problem, said that an averment that a riot resulted is not necessary to a conviction of inciting to riot.[7] In most of the cases the defendant has been indicted for inciting to riot *and* riot.[8] Where a riot was found to have

[2] *Id.* at 741, 107 S.E.2d at 738, quoting Commonwealth v. Sciullo, 169 Pa. Super. 318, 321, 82 A.2d 695, 697 (1951).

[3] Riot is defined as a tumultuous disturbance of the peace by three or more persons assembling together of their own authority with an intent mutually to assist one another against all who shall oppose them, and afterwards putting the design into execution in a terrific and violent manner, whether the object in question be lawful or otherwise. State v. Hoffman, 199 N.C. 328, 154 S.E. 314 (1930); State v. Stalcup, 23 N.C. 30 (1840).

[4] Commonwealth v. Haines, 4 Clark (Pa.) 17 (1824).

[5] State v. Cole, 249 N.C. 733, 107 S.E.2d 732 (1959); Commonwealth v. Apriceno, 131 Pa. Super. 158, 198 Atl. 515 (1938); Commonwealth v. Safis, 122 Pa. Super. 333, 186 Atl. 177 (1936); Commonwealth v. Merrick, 65 Pa. Super. 482 (1917).

[6] Commonwealth v. Sciullo, 169 Pa. Super. 318, 82 A.2d 695 (1951); Commonwealth v. Frankfeld, 114 Pa. Super. 262, 173 Atl. 834 (1934); Commonwealth v. Egan, 113 Pa. Super. 375, 173 Atl. 764 (1934).

In England inciting to riot seems to be a properly indictable offense when no riot—or even assembly—occurred. No reported cases were found but there is a "precedent" (apparently based on an unreported case) on inciting to riot, where the first count of the indictment alleged that as a result of the incitement there was an assembly, and the second count alleged the inciting and omitted the assembling in consequence of it. 1 RUSSELL, CRIMES 381 (9th ed. 1877); see CROWN CIRCUIT ASSISTANT 167 (1788); CROWN CIRCUIT COMPANION 420 (1st Amer. ed. 1816); 2 CHITTY, CRIMINAL LAW § 506 (1841); 3 BISHOP, NEW CRIMINAL PROCEDURE § 999(4) (1913).

[7] United States v. Fenwick, 25 Fed. Cas. 1062 (No. 15086) (D.C. Cir. 1836).

[8] Commonwealth v. Apriceno, 131 Pa. Super. 158, 198 Atl. 515 (1938); Commonwealth v. Safis, 122 Pa. Super. 333, 186 Atl. 177 (1936); Commonwealth v. Egan, 113 Pa. Super. 375, 173 Atl. 764 (1934); Commonwealth v. Merrick, 65 Pa. Super. 482 (1917); United States v. Fenwick, 25 Fed. Cas. 1062 (No. 15086) (D.C. Cir. 1836).

occurred, the court in one case upheld a conviction without stating whether this was done on one or both counts,[9] while two cases indicated that the conviction could be upheld on either or both counts.[10] However, it has also been said that the lesser crime of inciting to riot may become merged in the more serious crime of riot,[11] and apparently one conviction has been affirmed on that basis.[12]

Although basically in accord with the American cases, the English cases have gone to the extent of holding that one who incites, encourages, promotes, or abets a riot may be held as a principal rioter,[13] even though he takes no active part in the riot or is not present when it occurs.[14] The only American case found that has considered this latter point merely recognized that the common law permitted this to be done.[15]

While there is accord between the American and English cases on the proposition that even though no riot ensues the defendant's conduct may nevertheless be the basis for a conviction of inciting to riot,[16] this may not be the law in North Carolina, as indicated by dictum to the contrary in the *Cole* case. It is submitted that if North Carolina continues to require that the riot be proved, the indictment should contain charges for inciting to riot *and* riot, and the conviction should be for riot, or possibly, as warranted by some of the Pennsylvania cases,[17] for inciting to riot *and* riot.

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[9] United States v. Fenwick, *supra* note 8.

[10] Commonwealth v. Apriceno, 131 Pa. Super. 158, 198 Atl. 515 (1938); Commonwealth v. Safis, 122 Pa. Super. 333, 186 Atl. 177 (1936).

[11] Commonwealth v. Apriceno, *supra* note 10; Commonwealth v. Merrick, 65 Pa. Super. 482 (1917). The application of "merger" may be questioned if the strict common law definition of merger is adhered to: "The common law rule was that, if the offenses were of different degrees, there was a merger, but not if they were of the same degree. Misdemeanors merged in felonies . . . and conspiracy to commit a felony in the felony, if committed. But there was no merger of a felony in a felony. . . . Nor was there any merger of a misdemeanor in a misdemeanor, as of an attempt or conspiracy to commit a misdemeanor in the misdemeanor when committed." CLARK & MARSHALL, CRIMES, 103 (6th ed. 1958). See also Graff v. People, 208 Ill. 312, 70 N.E. 299 (1904).

[12] Commonwealth v. Merrick, *supra* note 11.

[13] Regina v. Sharpe, 3 Cox C.C. 288, 12 L.T.O.S. 537 (1848); Clifford v. Brandon, 2 Camp. 358, 170 Eng. Rep. 1183 (Com. Pl. 1809); Rex v. Royce, 4 Burr. 2073, 98 Eng. Rep. 81 (K.B. 1767); Anonymous, 12 Mod. Rep. 509, 88 Eng. Rep. 1482 (K.B. 1702). Compare: "In misdemeanors there are no degrees, but all who participate in them are principals and may be charged as such and convicted upon proof of having taken any part therein." Commonwealth v. Jaffas, 284 Mass. 417, 419, 188 N.E. 263, 264 (1933).

[14] "It is not the hand that strikes the blow, or throws the stone that is alone guilty under the circumstances; but that he who inflames people's minds and induces them, by violent means, to accomplish an illegal object, is himself a rioter, though he takes no part in the riot." Regina v. Sharpe, 3 Cox C.C. 288 (1848).

[15] Commonwealth v. Merrick, 65 Pa. Super. 482 (1917).

[16] This is also in accord with the English law relating to inciting to other crimes. Rex v. Higgins, 2 East 5, 102 Eng. Rep. 269 (K.B. 1801); see generally, 14 ENGLISH & EMPIRE DIGEST, Part I, § 6(7) (1956).

[17] Commonwealth v. Apriceno, 131 Pa. Super. 158, 198 Atl. 515 (1938); Commonwealth v. Safis, 122 Pa. Super. 333, 186 Atl. 177 (1936).